BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
for Consent to Transfer Control	)	

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OF SPRINT COMMUNICATIONS COMPANY L.P.

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April 12, 1999

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TO: Chief, Common Carrier Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. ("Sprint"), by its attorneys and pursuant to section 1.106 of the Commission's rules, hereby submits this reply to the "Opposition to Petition for Reconsideration" ("Opposition") filed jointly by GTE Corporation and Bell Atlantic Corporation ("Applicants") on April 5, 1999. The Opposition was filed in response to Sprint's March 25, 1999, Petition for Reconsideration ("Petition") of the Bureau's decision to prohibit two of Sprint's in-house attorneys from reviewing the confidential materials in the above-referenced proceeding.[1]

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[1] GTE Corp. and Bell Atlantic Corp., for Consent to Transfer of Control, CC Dkt. No. 98-184, *Order Ruling on Joint Objections* ¶ 2 (CCB, Policy and Program Planning Division rel. Feb. 23, 1999) ("GTE/BA Ruling").

I. INTRODUCTION.

In the Petition, Sprint demonstrated that the Bureau applied the "competitive decision-making"[2] standard to Sprint's attorneys in a manner contrary to the relevant case law. These precedents hold, inter alia, that in-house attorneys may not be denied access to confidential documents under the "competitive decision-making" standard employed in the Protective Order merely because the attorneys have a "high-level" of seniority or because these attorneys provide legal advice to their clients.

The Applicants argue essentially two points in response to Sprint's Petition.[3] First, the Applicants erroneously characterize the Petition as relying on new facts and then urge that it be denied pursuant to Section 1.106(c) of the Commission's rules. Second, the Applicants urge the Bureau to

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[2] See GTE Corp. and Bell Atlantic Corp., For Consent to Transfer of Control, CC Dkt. No. 98-184, *Order Adopting Protective Order*, Ex. A (CCB rel. Nov. 19, 1998) ("Protective Order") ("Stamped Confidential Documents may be reviewed by . . . in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making, *i.e.*, counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor").

[3] The Applicants also claim that Sprint would not be prejudiced by denial of the Petition because another Sprint in-house attorney was not challenged by the Applicants. Petition at 2, 4. This suggestion is specious. The Applicants are not entitled to hamper Sprint's participation in this proceeding by limiting in-house counsel access to the materials outside the confines of the Protective Order. Properly applied, Mr. Kestenbaum and Mr. Dingwall meet the requirements of the Protective Order and Sprint is entitled to their advice and assistance in this matter.

hold that in-house counsel should be denied access to confidential documents if one of the two following criteria are met: (1) the attorney's advice is used to inform business decisions; or (2) the attorney is of sufficiently high position. Neither argument is correct and both should be rejected by the Bureau. Sprint's Petition should be granted.

II. THE PETITION DOES NOT RELY ON NEW FACTS, AND THE "COMPETITIVE DECISION-MAKING" STANDARD CANNOT LAWFULLY BE APPLIED AS SUGGESTED BY THE APPLICANTS.

The Applicants claim that the Petition relies on affidavits submitted by Mr. Leon Kestenbaum and Mr. Craig Dingwall as attachments to the Petition and that these affidavits seek to introduce new evidence as to the job responsibilities of Mr. Kestenbaum and Mr. Dingwall without the justification required by Section 1.106. This argument is plainly erroneous.

The factual evidence relied on in the Petition as to the job responsibilities of the in-house counsel in question was presented to the Commission in Sprint's Opposition to the Applicants' objection. First, Sprint stated that neither attorney is involved in "competitive decision-making,"[4] and then provided the basis for that legal conclusion by describing the work of the attorneys. Sprint stated that "Mr. Kestenbaum's work consists of formulating regulatory positions and conveying them on behalf of Sprint to the FCC and the [DOJ], and reporting the

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[4] See Sprint Opposition at 4 (filed in CC Dkt. No. 98-184, Jan. 29, 1999).

results of such representation."[5] Sprint also stated that "Mr. Dingwall is responsible for formulating regulatory positions, conveying and advocating them on behalf of Sprint to state regulatory agencies, and reporting the results of such representation."[6] Sprint emphasized that "Mr. Kestenbaum and Mr. Dingwall function precisely as attorneys for their client."[7] The affidavits were submitted with the Petition to correct the Bureau's apparent misapprehension of these facts in the GTE/BA Ruling. In any event, the gravamen of the Petition is that the GTE/BA Ruling was based upon a misapplication of precedent the Bureau previously relied upon to adopt the competitive decision-making standard, an argument that does not rely on the introduction of new facts (or, for that matter, new law). Thus, the Petition complies with Section 1.106 of the Commission's rules in every respect.

The Applicants' terse argument on the merits is plainly contrary to precedent. The Applicants urge the Commission to ignore applicable precedent -- precedent that was relied on by the Bureau itself in adopting the "competitive decision-making"

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5 Id.

6 Id.

7 Id. Thus, the Applicants' claim that Sprint relied on a "mere assertion" that its attorneys were not involved in competitive decision-making "without any type of substantiation" (Opposition at 3) is simply wrong. Indeed, Sprint's description of its attorneys' job responsibilities in its Opposition far exceeded that supplied by AT&T for Aryeh Friedman, who was granted access to the documents by the Commission. See GTE/BA Ruling ¶ 3.

standard -- and create a new "competitive decision-making" standard directly contrary to that precedent.[8] Specifically, the Applicants suggest that if Sprint uses its regulatory counsel's legal advice to inform business decisions, such counsel should be denied access to confidential documents. The Applicants further allege that the Bureau merely applied a pre-existing "rule" that "lawyers at a sufficiently high position in the telecommunications company should not be granted access to confidential documents. . . ."[9] Both of these suggested bases for the Bureau's decision are contrary to law and must be rejected.

First, the Applicants are wrong to suggest that the Bureau has intentionally altered or modified the "competitive decision-making" standard adopted in the federal courts. In adopting the Protective Order, the Bureau noted that the competitive decision-making standard it adopted was the same standard used by the federal courts, and adopted by the Bureau for use, *inter alia*, in the WorldCom/MCI proceeding.[10] Thus, the Petition seeks only

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[8] The Applicants suggest that their preferred analysis for the competitive-decision making standard was "adopted by the Commission" and that this precedent was merely applied by the Bureau in the GTE/BA Ruling. As demonstrated below, this suggestion is simply incorrect.

[9] Opposition at 3.

[10] See GTE Corp. and Bell Atlantic Corp., For Consent to Transfer of Control, CC Dkt. No. 98-184, Order Adopting Protective Order ¶ 5 (CCB rel. Nov. 19, 1998) (citing WorldCom/MCI and SBC/Ameritech Protective Orders); Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., CC Dkt. No. 97-211, *Order Adopting Protective Order* ¶ 5 (CCB rel. June.

that the Bureau properly apply its standard in accordance with the federal courts' interpretation of the competitive decision-making standard.[11]

Similarly, the Applicants' argument that in-house attorneys may be deemed involved in competitive decision-making if their legal advice is used to inform business decisions is plainly contrary to applicable legal precedent. For example, in Independent Service Organizations Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71,099, the court determined that an in-house attorney was not involved in "competitive decision-making" notwithstanding the fact that he had previously provided legal advice on a number of issues, including prices. The court reasoned that:

> [a] memorandum describes Marshall's conduct as providing 'legal advice.' Numerous courts have held that providing legal advice is not a basis for barring in-house counsel from confidential material.[12]

Plainly, providing legal advice on regulatory matters, like legal advice on other matters, is not tantamount to involvement in "competitive decision-making."[13]

5, 1998) ("Consistent with [the U.S. Steel line of] federal court cases, we define 'competitive decision-making' . . . .").

[11] See Petition at 3 n.5.

[12] See Independent Service Organizations ¶ 71,099 (citations omitted) (emphasis added).

[13] The fact that Sprint's management actually uses this advice to operate the company within the bounds of the law does not somehow transform the legal advice into participation in the making of business decisions.

Finally, the Bureau is not free, as suggested by the Applicants, to find that in-house attorneys are involved in competitive decision-making simply because they have a high position in a company or an impressive title. Rather, the actual relationship between the attorney and the client are dispositive.[14] Indeed, in Matsushita Elec. Indus. Co. v. United States,[15] the court held that "denial of access sought by in-house counsel on the sole ground of status as a corporate officer is error."[16] Accordingly, the court overturned the denial of access to confidential materials to an in-house attorney with the titles of General Counsel, Senior Vice President and Secretary.

Perhaps most importantly, the court determined that, notwithstanding holding several impressive titles in the company, the in-house attorney's assertions that he did not participate in "competitive decision-making" were to be believed, absent any contrary evidence.[17] *No contradictory evidence has been put*

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[14] As stated in U.S. Steel,

> [w]hether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined . . . by the facts on a counsel-by-counsel basis . . . . [A]ccess should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented . . . ."

U.S. Steel at 1468-69 (Fed. Cir. 1984) (emphasis added). See Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992) (stating that district court must examine factually all risks and safeguards surrounding inadvertent disclosure).

[15] 929 F.2d 1577 (Fed. Cir. 1991).

[16] Id. at 1580.

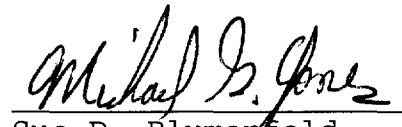
[17] See id.

forth by the Applicants and none was relied upon by the Bureau in the GTE/BA Ruling. Thus, in the absence of such contradictory evidence, the Bureau must rule in favor of Mr. Kestenbaum and Mr. Dingwall based upon evidence establishing their lack of involvement in "competitive decision-making" and their job responsibility to provide only legal -- not business -- advice to Sprint.

III. CONCLUSION

Sprint respectfully urges the Bureau to reconsider its decision in the GTE/BA Ruling and to determine that Mr. Leon M. Kestenbaum and Mr. Craig D. Dingwall of Sprint may review all confidential materials filed by the Applicants pursuant to the GTE/BA Protective Order.

Respectfully submitted,



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I, Dennette Manson, do hereby certify that on this 12th day of April, 1999, copies of the "Reply To Opposition To Petition for Reconsideration of Sprint Communications Company L.P." were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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